

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

DYNASTUDY, INC.

Plaintiff,

v.

HOUSTON INDEPENDENT
SCHOOL DISTRICT

Defendant.

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Case No. 4:16-cv-01442
JURY DEMAND

**PLAINTIFF’S MOTION FOR PARTIAL SUMMARY JUDGMENT ON HISD’S
LIABILITY FOR VIOLATIONS OF THE DIGITAL MILLENNIUM COPYRIGHT ACT**

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I. SUMMARY OF ISSUES PRESENTED

Defendant HISD has committed hundreds of violations of the Digital Millennium Copyright Act (“DMCA”) with regard to at least fifteen (15) of DynaStudy’s valid, federally registered copyrighted works. In many cases, HISD has intentionally removed copyright management information (“CMI”) from DynaStudy’s materials and then distributed the copies, with full knowledge that its actions were likely to encourage further infringement. In other instances, HISD distributed unauthorized copies of DynaStudy’s materials despite knowledge that DynaStudy’s CMI had been removed prior to distribution. These acts constitute violations of the DMCA for which DynaStudy seeks the recovery of statutory damages as well as other remedies. Because the pleadings and evidence show that no genuine issue of material fact exists with regard to HISD’s liability for violations of the DMCA, and because no evidence exists to support HISD’s safe harbor defense, DynaStudy seeks summary judgment on its claim for violations of the DMCA and a ruling that HISD has no safe harbor defense for these DMCA violations.

II. NATURE AND STAGE OF PROCEEDING

This matter involves pervasive copyright infringement as well as numerous violations of the DMCA. With the exception of a few outlying issues submitted to the magistrate judge, fact and expert discovery have closed.

III. FACTS

Over the course of at least eleven (11) years, HISD has committed repeated DMCA violations involving at least fifteen of DynaStudy’s federally registered copyrights, including: Biology EOC, Grade 4 Math for TAKS, Grade 4 Reading for TAKS, Grade 5 Science for TAKS, Grade 5 Math for TAKS, Grade 6 Math for TAKS, Grade 7 Math for TAKS, Student Test-Taking Tips, Grade 8 Science for STAAR, Grade 8 Science for TAKS, Exit Level Science, Grade 3 Math

for TAKS, Grade 5 Reading for TAKS, Grade 8 Math for TAKS, and Grade 8 Social Studies for TAKS (the “Copyrighted Works”).

DynaStudy owns the copyrights in its Copyrighted Works, which are registered with the United States Copyright Office and are currently valid, subsisting, and in full force and effect.¹ HISD legally purchased print materials from DynaStudy from 2005 through 2016 and even into the present, including prior to the infringing activities set forth herein.² DynaStudy’s print materials are clearly marked with its copyright notice and include a specific term of use in the bottom margin (i.e., “COPYING THIS MATERIAL IS STRICTLY PROHIBITED”).³

HISD received repeated notices of ongoing infringement beginning on November 1, 2012;⁴ May 1, 2014;⁵ July 28, 2015;⁶ August 27, 2015;⁷ and April 4, 2016.⁸ The infringement continued and DynaStudy was ultimately forced to bring this lawsuit on May 24, 2016. Still, HISD made no concerted effort to fully identify and stop the pervasive infringement.⁹

HISD’s document productions in October 2017 and May 2018 identified hundreds of violations of the DMCA committed by HISD. For example, HISD employee Michael Partridge admitted that he took the original Biology End-of-Course Review Guide (“EOC”) that his school purchased from DynaStudy for his entire department and created an unauthorized copy.¹⁰ Partridge

¹ See Ex. A: DynaStudy Certificates of Registration; Ex. B: Certified Copies of Deposit.

² See Ex. I-3: DynaStudy Invoices to HISD.

³ See Ex. I: Declaration of Ellen Harris.

⁴ See DynaStudy correspondence to HISD dated November 1, 2012, attached hereto as Ex. C.

⁵ See DynaStudy correspondence to HISD dated May 1, 2014, attached hereto as Ex. D.

⁶ See DynaStudy correspondence to HISD dated July 28, 2015, attached hereto as Ex. E.

⁷ See DynaStudy correspondence to HISD dated August 27, 2015, attached hereto as Ex. F.

⁸ See DynaStudy correspondence to HISD dated April 4, 2016, attached hereto as Ex. G.

⁹ See DynaStudy’s correspondence to HISD dated May 11, 2017, attached hereto as Ex. H; *see also* DMCA Use, Distribution and Count (“DMCA Count”), attached hereto as Ex. I-1.

¹⁰ See Ex. J: Partridge depo., pp. 14:8-15:10; 19:10-16; 19:25-20:11; 20:20-21:19; 30:15-31:18 and depo. exhibits 2-14; *see also* Ex. I-1: DMCA Count, pp. 13-14 (citing HISD00008215).

intentionally removed the CMI from the margins,¹¹ printed copies of his unauthorized copy,¹² distributed it to his students,¹³ posted a link to his unauthorized copy to his classroom website,¹⁴ and repeatedly distributed various versions of his unauthorized copy (in .PDF and in Word format), to his colleagues and students in 2012, 2013, and 2014.¹⁵

Similarly, in 2013, HISD's Cecillia VanDuyn distributed a separate unauthorized copy of DynaStudy's Biology EOC to HISD's Maria Garner, noting "[h]ere is another file, this one I can email since it is less memory. *And has 'no copying' blocked with post it notes.*"¹⁶ VanDuyn's copy was circulated by numerous HISD employees, each of whom referred to the material by name demonstrating they knew these copies were DynaStudy knockoffs.¹⁷ In this same manner, from 2009 through 2014, HISD's Stephanie Miller repeatedly distributed an unauthorized copy of DynaStudy's Grade 8 Science for TAKS with all CMI removed from the margins.¹⁸ Miller referred to the file as "Dyna notes," and expressly warned a colleague "don't forget to take off bottom warning before copying a class set."¹⁹ Miller also distributed unauthorized copies of DynaStudy's Grade 4 Math for TAKS, Grade 5 Math for TAKS, Grade 6 Math for TAKS, and Grade 7 Math for TAKS, all with CMI removed.²⁰ While these are just a few examples of HISD's numerous

¹¹ Ex. J: Partridge deposition, pp. 17:19-18:11; 70:17-71:12; 79:14-81:22; 85:4-12; 86:14-88:4; 105:14-106:19 and depo. exhibits 2-14.

¹² *Id.* at pp. 68:6-70:1; 77:22-79:13; 94:14-96:14; 115:7-116:24; 126:15-127:1; 127:16-128:25.

¹³ *Id.*

¹⁴ *Id.* at pp. 23:4-24:5; 26:6-8; 105:14-106:19.

¹⁵ *Id.* at pp. 68:6-19; 68:20-70:1; 96:19-97:12; 97:20-99:7; 100:12-102:25; 103:1-104:2; 104:11-14; 113:1-114:14; 116:25-117:20; 118:20-119:19.

¹⁶ See Ex. I-1: DMCA Count, at pp. 64-73 (citing HISD0018440-18444).

¹⁷ *Id.* at pp. 64-73 (citing HISD0018440-18444).

¹⁸ *Id.* at pp. 353-35 (citing HISD00033153-33154, 00036159-36160, 00036136-36137, 00034243-34244 36658-3665, 00039561-39562, 00041946-41951, 00041946-41947).

¹⁹ *Id.* at pp. 353-35, 380-381 (citing HISD00033153-33154, 00036159-36160, 00036136-36137, 00034243-34244 36658-3665, 00039561-39562, 00041946-41951, 00041946-41947).

²⁰ *Id.* at pp. 127 (citing HISD00035011).

DMCA violations, each incident at issue is set forth in detail in Exhibits I-1 and I-2, complete with references to the HISD Bates-labeled documents establishing each violation.

HISD has not registered its DMCA agent, Cynthia Williams, with the U.S. Copyright Office and has not posted the name and contact information for such DMCA agent on its website at www.houstonisd.org.²¹

IV. SUMMARY JUDGMENT STANDARD

To grant summary judgment, a court must find that the pleadings and evidence show that no genuine issue of material fact exists, and that the movant is therefore entitled to judgment as a matter of law. FED. R. CIV. P. 56.

Summary judgment should be granted “against a party who fails to make a showing sufficient to establish the existence of an element essential to that party’s case and on which that party will bear the burden of proof at trial.” *UMG Recording v. Escape Media Group*, 2014 U.S. Dist. LEXIS 137491 (S.D.N.Y. Sept. 29, 2014), citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 322, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986); see also *Little v. Liquid Air Corp.*, 37 F.3d 1069, 1075 (5th Cir. 1994). If the moving party meets its initial burden, the non-moving party must “go beyond the pleadings” and designate “specific facts showing that there is a genuine issue for trial.” *Celotex*, 477 U.S. at 324, quoting FED. R. CIV. P. 56(e); see also *Ragas v. Tenn. Gas Pipeline Co.*, 136 F.3d 455, 458 (5th Cir. 1998).

V. ARGUMENT AND AUTHORITIES

A. HISD employees made and distributed unauthorized copies of DynaStudy’s Copyrighted Works in violation of the DMCA

²¹ See HISD’s Response to Request for Production No. 1 attached hereto as Ex. K; see also Exhibit L: Screenshot of Schoolwires’s designation of DMCA agent; Exhibit M: U.S. Copyright filing of notice of DMCA agent on behalf of Schoolwires; Exhibit O: HISD’s 30(b)(6) Deposition of Annie Wolfe at pp. 37:10-38:5 (identifying HISD’s designated agent for the DMCA as Chief of Staff Cynthia Wilson and, prior to her, Jason Spencer).

1. ***HISD created and distributed unauthorized copies of DynaStudy's Copyrighted Works with CMI altered or removed***

Section 1202(b) of the DMCA prohibits a person from intentionally removing or altering any CMI, or distributing copyrighted works with the knowledge that the CMI has been altered or removed, without the copyright owner's permission. *See* 17 U.S.C. §1202(b). "Courts have applied this statute in a straightforward manner" such that DynaStudy need only establish (1) the existence of CMI on the works in question; AND (2) intentional removal and/or alteration of that information; **OR** (3) distribution of unauthorized copies with the CMI removed or altered with the knowledge that the CMI had been altered or removed without consent. *See Sheldon v. Plot Commerce*, 2016 U.S. Dist. LEXIS 116135, *35 (E.D.N.Y. Aug. 26, 2016) (emphasis added). DynaStudy must also demonstrate that HISD knew or had reasonable grounds to know that such actions would induce, enable, facilitate, or conceal an infringement of any right under the DMCA. *See* 17 U.S.C. §1202(b). The DMCA defines CMI to include, among other things:

- the title and other information identifying the work, including the information set forth on a notice of copyright;
- The name of, and other identifying information about, the copyright owner of the work, including the information set forth in a notice of copyright; and
- Terms and conditions for use of the work. *Id.*

HISD has repeatedly violated § 1202(b) as to DynaStudy's Copyrighted Works at least 2,100 times.²² HISD employees intentionally created unauthorized copies of DynaStudy's Biology EOC with CMI removed or altered in each copy and/or distributed such copies despite knowledge that the CMI had been removed or altered and that such removal and distribution would induce, enable, facilitate or conceal infringement of DynaStudy's rights under the DMCA.

²² *See* Ex. I-1: DMCA Count.

For example, as demonstrated in the table below at Row 1, column 1, HISD violated §1202 as to DynaStudy's copyrighted Biology End-of-Course Review Guide ("EOC") when it created an unauthorized copy entitled "*Dyna Notes Biology EOC Review.docx*." Row 1, column 2 of the table identifies the particulars of those violations, i.e., the creation and distribution of that file by HISD's Michael Partridge on May 2, 2012, as well as additional distribution of that file by others who had knowledge of DynaStudy's copyright protections and knew that CMI had been removed from Partridge's unauthorized copy. The top of Row 1, column 3 includes DynaStudy's count of DMCA violations based on the first paragraph, specifically the copy Partridge created by removing CMI (1 violation) and his distribution of that file to four colleagues who were familiar with DynaStudy's products and the protections afforded such products and where these HISD employees knew or should have known that CMI had been removed. (4 violations). The remainder of the table (and Table 2 below) follows the same organization:

Registration / File Name	HISD Employee(s) and Creation/Distribution	DMCA Violation Count
Biology End-of-Course Review (TX0007393204) <i>"Dyna Notes Biology EOC Review.docx"</i> ²³	May 2, 2012, Michael Partridge circulated an unauthorized copy to 4 colleagues. In his email, Partridge expressly stated "I have attached the DYNAnotes review sheet that I scanned and turned into an electronic document. I printed one out for my students...." Partridge intentionally removed all CMI from the margins of the original DynaStudy document. ²⁴	5
	On April 24, 2013, Partridge's co-worker Nicole DiLuglio emailed Partridge's copy (identified by name as dyna notes) to Ricardo Mena. ²⁵ DiLuglio sent the same file to another recipient on May 6, 2013. ²⁶ In May 2014, DynaStudy discovered that DiLuglio had also posted Partridge's copy (identified by name as Dyna Notes) to her classroom	2
		1
		1

²³ See Ex. I-2: DMCA Side-by-side Comparison ("DMCA Comparison"), at pp. 19-25, 26-32, 61-68.

²⁴ See Ex. I-1: DMCA Count, at pp. 13-14 (citing HISD00008215-8216); see also Ex. J: Partridge depo., pp. 14:8-15:10; 19:10-16; 19:25-20:11; 20:20-21:19; 30:15-31:18.

²⁵ See Ex. I-1: DMCA Count, at pp. 17-18 (citing HISD00010009 and HISD 00010010).

²⁶ *Id.* at pp. 19-21 (citing HISD00028522 and HISD 00028523); see also Ex. N: DiLuglio depo., pp. 50:1-51:20 and depo. exhibit 10.

Registration / File Name	HISD Employee(s) and Creation/Distribution	DMCA Violation Count
	website. ²⁷ DiLuglio distributed another copy of Partridge's file on May 28, 2015. ²⁸	1
	Partridge re-circulated the same unauthorized copy on April 22, 2014 (in .pdf), ²⁹ April 24, 2014, ³⁰ and October 30, 2014 (in .pdf). ³¹	6
	On April 16, 2015, HISD employee Dominique Ortiz located the Partridge file online and distributed a copy of the file to HISD employee Marla Maharaj. ³² Maharaj posted the same file on her classroom website in July 2015. ³³ The exact file was also located on HISD's website, houstonisd.org, in February 2017. ³⁴	2
		1
		1
	Partridge's colleague, Sonja Vodehnal, posted the same file on her own website in March 2017. ³⁵	1
<i>"Copy of Dyna Notes Biology EOC Review.docx"</i> ³⁶	On May 1, 2013, Partridge distributed a separate copy of DynaStudy's Biology EOC to four recipients. ³⁷ Partridge sent the same file again on May 3, 2013, this time to HISD's Amanda Schulz-Weaver. ³⁸	4
		1
<i>"Dyna Notes Biology EOC Review.pdf"</i> ³⁹	May 3, 2012, Shannon Flores, the department chair who initially provided Partridge with the copyrighted version, posted Partridge's copy (identified as Dyna Notes) on her classroom blog/website for her students to access and review. ⁴⁰	1
	That same day, Flores sent the unauthorized file to 159 students and advised them that they would each receive a	317

²⁷ *Id.* at pp. 23-27 (citing HISD000200 and DynaStudy 000835-836); *see also* Ex. N: DiLuglio depo. at pp. 52:17-53:6; 53:23-54:14; 55:6-9, 17-25; 56:1-8 and depo. exhibits 2, 4, 8.

²⁸ *Id.* at pp. 30-31 (citing HISD00028463 and HISD 00028465); *see also* Ex. N: DiLuglio depo. at pp. 52:17-53:6; 53:23-54:14; 55:6-9 and depo. exhibit 11.

²⁹ *See* Ex. I-1: DMCA Count, at pp. 56-57 (citing HISD00008565-8566).

³⁰ *Id.* at pp. 22 (citing HISD00028547); *see also* Ex. J: Partridge depo., pp. 96:19-97:12; 97:20-99:7 and depo. exhibits 2-14.

³¹ *Id.* at pp. 58-59 (citing HISD00015914-15915); *see also* Ex. I-2: DMCA Comparison, at pp. 40-46.

³² *Id.* at pp. 28-29 (citing HISD00002505 and HISD 00002506); *see also* Ex. I-2: DMCA Comparison, at pp. 26-32.

³³ *Id.* at pp. 32-35.

³⁴ *Id.* at pp. 36-40 (citing DynaStudy000289-291, 000264-271).

³⁵ *Id.* at pp. 41-46 (citing DYNA000908-909, 000916, 000900, and 000906-907).

³⁶ *See* Ex. I-2: DMCA Comparison, at pp. 61-67.

³⁷ *See* Ex. I-1: DMCA Count, at pp. 74-75 (citing HISD00008252-8253).

³⁸ *Id.* at pp. 76-77 (citing HISD000015660 -15661); *see also* Ex. J: Partridge depo., at pp. 68:6-70:1.

³⁹ *See* Ex. I-2: DMCA Comparison, at pp. 40-46.

⁴⁰ *See* Ex. I-1: DMCA Count, at pp. 15-16 (citing HISD000902 and HISD 000903).

Registration / File Name	HISD Employee(s) and Creation/Distribution	DMCA Violation Count
	<p>paper copy in class.⁴¹</p> <p>On May 6, 2012, Flores distributed the unauthorized file to 3 recipients as a part of the lesson plan for her substitute teacher. Flores instructed HISD personnel to make 110 copies of the file for her students to use in class.⁴²</p> <p>HISD's Catherine Dodson sent herself a copy of the same file on April 20, 2015.⁴³</p> <p>Tricia Aguas sent a copy to Jonez Harlan on April 29, 2015.⁴⁴</p>	<p>115</p> <p>1</p> <p>1</p>
<i>"copy_of_dyna_notes_biology_eoc_review.pdf"</i> ⁴⁵	On or about November 23, 2015, DynaStudy discovered that Amanda Schulz-Weaver (co-worker of Partridge) had made a copy of Partridge's copy (entitled "dyna notes") and posted it on her classroom website. ⁴⁶	1
<i>"Dyanotes biology 200dpi.pdf"</i> ⁴⁷	<p>On April 8, 2013, HISD's Cecillia VanDuyn created and distributed a separate unauthorized copy of DynaStudy's Biology EOC to HISD's Maria Garner, noting "Here is another file, this one I can email since it is less memory. And has 'no copying' blocked with post its notes." VanDuyn requested that Garner print the copy or save it to a thumb drive for printing directly from the copy machine and stated that she would be asking for "another ream of paper." Garner responded that she "printed and submitted for copies...."⁴⁸</p> <p>On April 22, 2013, Van Duyn requested that HISD's Gloria Chavez make 125 copies of the same file. The subject line reads "Dyanotes biology...."⁴⁹</p> <p>On April 1, 2015, Maria Garner sent the unauthorized copy to HISD's Anita Prieto and requested that 535 copies be made for HISD employees Garner, Tee, Lee, and Patel.⁵⁰</p> <p>On April 7, 2018, Anita Prieto forwarded the unauthorized file to HISD's Maria Rodriguez, along with a request from</p>	<p>2</p> <p>126</p> <p>536</p>

⁴¹ *Id.* at pp. 49-51 (citing HISD00006197- 6199).

⁴² *Id.* at pp. 52-55 (citing HISD00014967- 14868, HISD 000014970, and HISD 00014977); *see also* Ex. I-2: DMCA Comparison at pp. 40-46.

⁴³ *See* Ex. I-1: DMCA Count, at pp. 60-61 (citing HISD00015898-15899).

⁴⁴ *Id.* at pp. 62-63 (citing HISD00009163-9164).

⁴⁵ *See* Ex. I-2: DMCA Comparison, at pp. 75-81.

⁴⁶ *See* Ex. I-1: DMCA Count, at pp. 80-87 (citing DYNA000867, 000870-872, 000874, 000840-000843).

⁴⁷ *See* Ex. I-2: DMCA Comparison, at pp. 47-53.

⁴⁸ *See* Ex. I-1: DMCA Count, at pp. 64-65 (citing HISD0018440-18444).

⁴⁹ *Id.* at pp. 66-67 (citing HISD00023576-23577).

⁵⁰ *Id.* at pp. 68-69 (citing HISD00018630-18631).

Registration / File Name	HISD Employee(s) and Creation/Distribution	DMCA Violation Count
	HISD's Nayan Patel for 205 copies. ⁵¹ Then, on June 29, 2015, Nayan Patel sent the file to Anita Prieto and requested another 140 copies be made. ⁵²	208 141
"4-7 dyna_notes_biology_eoc _review.pdf" ⁵³	In April 2017, HISD employee Diana Hoy created and/or distributed another copy of DynaStudy's Biology EOC (identified as "dyna notes") with all CMI removed from the left and bottom margins. ⁵⁴	2
"BiologyEOC DaynaNotes_Fixed.pdf" ⁵⁵	On March 9, 2012, HISD employee Wilmer Naranjo emailed a copy of DynaStudy's Biology EOC to Morgan Williams, stating "here is a soft copy of the Dayna notes." All CMI was removed from the copy created and distributed by Naranjo. ⁵⁶	2
	On May 3, 2012, C. Clayton, HISD Jack Yates HS Science Dept. Chair, distributed the same unauthorized copy of Biology EOC (with CMI removed) to 3 recipients asking, "do you think we should make copies for all of the students?" Clayton then sent the same file to 2 additional recipients, this time asking, "Could you make these into posters for me please ASAP?" ⁵⁷	6
	On October 19, 2015, Naranjo Wilmer once again distributed the same copy in two separate emails to two recipients. The subject line of each email read "Biology EOC Dayna notes." In the second email, Mr. Wilmer requested that the recipient "make 23 copies in color" so that he could "distribute them to my students starting tomorrow...." ⁵⁸	25
	HISD's Kimberly Yamali sent the same file to one recipient on March 10, 2016. ⁵⁹	2
"Biology_EOC_Notes_Fixed.pdf" ⁶⁰	On May 2, 2013, HISD's Sara Mitcham sent to two recipients an unauthorized copy with all CMI removed, stating "Here are the DYNA Notes...." ⁶¹	3

⁵¹ *Id.* at pp. 70-71 (citing HISD00026696-26697).

⁵² *Id.* at pp. 72-73 (citing HISD00026724-26725).

⁵³ See Ex. I-2: DMCA Comparison, at pp. 33-39.

⁵⁴ See Ex. I-1: DMCA Count, at pp. 47-48 (citing HISD00028426 and HISD 00028429).

⁵⁵ See Ex. I-2: DMCA Comparison, at pp. 12-18.

⁵⁶ See Ex. I-1: DMCA Count, at p. 1 (citing HISD00006118).

⁵⁷ *Id.* at pp. 3-6 (citing HISD00034756 and HISD 00034763).

⁵⁸ *Id.* at pp. 7-10 (citing HISD00042873 and HISD 00042879).

⁵⁹ *Id.* at pp. 11-12 (citing HISD00037982 and HISD 00037984).

⁶⁰ See Ex. I-2: DMCA Comparison, at pp. 68-74.

⁶¹ See Ex. I-1: DMCA Count, at pp. 78-79 (citing HISD00006991-6992).

Registration / File Name	HISD Employee(s) and Creation/Distribution	DMCA Violation Count
<i>"Dyna Notes Biology EOC (wQR).pdf"</i> ⁶²	On December 7, 2015, Catherine Dodson sent a separate copy of Biology EOC to one recipient. The document was entitled "Dyna Notes Biology EOC" and included an imbedded QR code for easier scanning/copying by recipients. ⁶³	2

In all, HISD employees committed at least 1,517 violations of the DMCA with regard to DynaStudy's Biology EOC registration (TX0007393204).⁶⁴

HISD also intentionally removed or altered CMI and unlawfully distributed such copies of DynaStudy's Grade 4 Math for TAKS, Grade 4 Reading for TAKS, Grade 5 Math for TAKS, Grade 5 Science for TAKS, Grade 6 Math for TAKS, Grade 7 Math for TAKS, Grade 8 Science for STAAR, and Grade 8 Science for TAKS as demonstrated below:

Registration	HISD Employee(s) and Creation/Distribution	DMCA Violations Count
Grade 4 Math for TAKS (TX0006359568) <i>"4th Math TAKS.doc"</i> ⁶⁵	On June 12, 2007, HISD employee James Street distributed an unauthorized copy of DynaStudy's Grade 4 Math for TAKS, Grade 4 Reading for TAKS, and Grade 5 Science for TAKS (with all CMI removed) to 46 HISD employees. ⁶⁸ Street admits that the copies he distributed are identical to DynaStudy's copyrighted originals but for the removal of CMI in the margins. ⁶⁹ Street had numerous communications with DynaStudy prior to that time. ⁷⁰ Recipient Anita Lundvall forwarded the files to two others on the same day with the instruction to "please share with your teams." Metadata for these emails shows that the files were created by "HISD" on February 7, 2007 ("5 th Grade Science TAKS Review Guide.doc") and February 12, 2007 (remaining files). ⁷¹	47 per work
Grade 4 Reading for TAKS (TX0006347318) <i>"4th Reading TAKS.doc"</i> ⁶⁶		2 per work
Grade 5 Science for TAKS		

⁶² See Ex. I-2: DMCA Comparison, at pp. 82-88.

⁶³ See Ex. I-1: DMCA Count, at pp. 88-89 (citing HISD00010776-10777).

⁶⁴ *Id.* at pp. 1-89; see also Chart, supra. pp. 6-12.

⁶⁵ See Ex. I-2: DMCA Comparison, at pp. 127-129.

⁶⁶ *Id.* at pp. 133-135.

⁶⁸ See Ex. I-1: DMCA Count, at pp. 107-108, 137-138, 191-192 (citing HISD00009441-9449).

⁶⁹ See Ex. R: Street depo., at pp. 115:14-17; 127:15-128:1; 128:4-129:13; 129:16-130:7; 130:12-130:21; 130:25-131:22; 132:6-9; 132:13-21; 136:8-137:4.

⁷⁰ See *id.* at pp. 79:4-21; 80:2-4; 80:16-81:14; 82:15-83:4; 83:18-84:11; 84:24-85:18; 86:15-18; 87:12-19; 88:9-89:9; 89:14-90:20; 92:4-14; 93:1-12; 93:24-96:1; 96:7-99:19; 101:19-102:20; 103:1-9; 103:20-105:1; 105:20-106:1; 112:12-113:10.

⁷¹ See Ex. I-4: Metadata chart.

Registration	HISD Employee(s) and Creation/Distribution	DMCA Violations Count
(TX0006317606) <i>"5th Grade Science TAKS Review Guide.doc"</i> ⁶⁷	Diane Benavides shared the same file with 6 HISD employees on June 18, 2007. On March 27, 2009, HISD's Kameetra Ellis shared the same file with 6 others, noting "It's the Dyna notes quick-study TAKS review. If you'd like, make copies for the kids who may need them." ⁷² Kameetra Ellis forwarded her earlier email (with the same unauthorized attachments) to 8 more recipients on April 1, 2009. ⁷³ Ellis's recipient Strasser-King then forwarded the same file (still called dyna notes) to other HISD employees. ⁷⁴ Marilyn Thompson (in the down-line distribution from Ellis) distributed the same violating files to her personal email on April 14, 2009. ⁷⁵	6 per file 6 per file 8 per file 2 per file 1 per file
Grade 4 Math for TAKS (TX0006359568) <i>"4th Math TAKS.doc"</i> ⁷⁶	Marilyn Thompson also send only the Grade 4 Math for TAKS copy to HISD's Smita Ghosh on October 5, 2009. ⁷⁷ Shelene Livas distributed the same file to 4 recipients on December 18, 2012. ⁷⁸	1 5
<i>"4th MathTAKS[I].doc"</i> ⁷⁹	On August 27, 2010, HISD's Mario Sandoval requested that Smita Ghosh provide him a copy of "4 th grade dyna-notes." Ghosh provided an unauthorized copy with all CMI removed on that same day. ⁸⁰	1
Grade 4 Reading for TAKS (TX0006347318) <i>"4th reading TAKS.doc"</i> ⁸¹	Marilyn Thompson sent an unauthorized copy with all CMI removed to HISD's Sarah Hymes on Oct. 5, 2009. ⁸² Hymes forwarded the same file to 1 recipient on Oct. 20, 2009. ⁸³ Shelene Livas sent the same file to 4 recipients on December 18, 2012. ⁸⁴	1 2 5
Grade 4 Math for TAKS (TX0006359568)	On December 7, 2012, HISD's Stephanie Miller distributed to Carla Stutts unauthorized copies of DynaStudy's Grade 4 Math for TAKS, Grade 5 Math for TAKS, Grade 6 Math for TAKS,	2 per file

⁶⁷ See Ex. I-2: DMCA Comparison, at pp. 151-155.

⁷² See Ex. I-1: DMCA Count, at pp. 107-112, 137-152, 191-194, 203- 214 (citing HISD00009441-9442, 9444, 9446, 9452, 9455, 9457, HISD00016958-16959, 16962, 16964, 17332, 17335, 17337).

⁷³ *Id.* at pp. 116-117 (citing HISD00009452-9453).

⁷⁴ *Id.* at pp. 107-112, 137-152 (citing HISD00009441-9442, 9444, 9452, 9455, HISD 00016958-16959, 16962, 17332, 17335).

⁷⁵ *Id.* at pp. 120-122 (citing HISD00016958-16960).

⁷⁶ See Ex. I-2: DMCA Comparison, at pp. 127-129.

⁷⁷ See Ex. I-1: DMCA Count, at pp. 123-124 (citing HISD00033230-33231).

⁷⁸ *Id.* at pp. 131-132 (citing HISD00035034-35035).

⁷⁹ See Ex. I-2: DMCA Comparison, at pp. 130-132.

⁸⁰ See Ex. I-1: DMCA Count, at pp. 135-136 (citing HISD00004225-4226).

⁸¹ See Ex. I-2: DMCA Comparison, at pp. 136-138.

⁸² See Ex. I-1: DMCA Count, at pp. 153-154 (citing HISD00033233-33234).

⁸³ *Id.* at pp. 155-156 (citing HISD00033424-33425).

⁸⁴ *Id.* at pp. 157-158 (citing HISD00035008-35009).

Registration	HISD Employee(s) and Creation/Distribution	DMCA Violations Count
<p><i>"4th Math TAKS.doc"</i>⁸⁵</p> <p>Grade 5 Math for TAKS (TX0006320462)</p> <p><i>"5th Math TAKS.doc"</i>⁸⁶</p> <p>Grade 6 Math for TAKS (TX0006346690)</p> <p><i>"6th Math TAKS.doc"</i>⁸⁷</p> <p>Grade 7 Math for TAKS (TX0006359567)</p> <p><i>"7th Math TAKS.doc"</i>⁸⁸</p>	<p>and Grade 7 Math for TAKS—referred to in the email as "the dynanotes for the TAKS math"—all with the CMI removed from the left and bottom margins.⁸⁹ Metadata from these emails establish that these files were created by "HISD" on February 12, 2007.⁹⁰</p> <p>Carla Stutts forwarded the same unauthorized files (without CMI) to 6 others on December 12, 2012. Stutts forwarded the files once more on December 11, 2012.⁹¹</p> <p>Recipient Candance Brooks of HISD's Johnston MS forwarded the same files to 2 more recipients on December 14, 2012.</p> <p>Jamie Scott distributed each of these unauthorized copies to one recipient on February 22, 2012. As with the above files, all CMI had been removed prior to distribution.⁹² Scott sent the same files to another recipient on Nov. 25, 2013.⁹³</p>	<p>6 per file 1 per file</p> <p>2 per file</p> <p>2 per file 1 per file</p>
<p>Grade 5 Math for TAKS (TX0006320462)</p> <p><i>"5th Math TAKS Study Guide.doc"</i>⁹⁴</p> <p>Grade 5 Science for TAKS (TX0006317606)</p> <p><i>"5th Grade Science TAKS Review Guide .doc"</i>⁹⁵</p>	<p>On July 18, 2007 (days after receiving other infringing files from James Street), Theresa Rose distributed unauthorized copies of Grade 5 Math for TAKS and Grade 5 Science for TAKS to 4 recipients. All CMI had been removed.⁹⁶</p>	<p>5 per file</p>
<p>Grade 5 Science for TAKS (TX0006317606)</p>	<p>Stephanie Miller distributed another copy of this unauthorized file (with all CMI removed) to 1 recipient on Aug. 21, 2009.⁹⁸</p>	<p>2 1</p>

⁸⁵ See Ex. I-2: DMCA Comparison, at pp. 127-129.

⁸⁶ *Id.* at pp. 142-144.

⁸⁷ *Id.* at pp. 156-158.

⁸⁸ *Id.* at pp. 159-161.

⁸⁹ See Ex. I-1: DMCA Count, at pp. 127 (citing HISD00035011).

⁹⁰ See Ex. I-4: Metadata chart.

⁹¹ See Ex. I-1: DMCA Count, at pp. 127-130, 175-176, 249-252 (citing HISD00035011-35032, HISD00039510-39526).

⁹² *Id.* at pp. 125-126, 173-174 (citing HISD00034704-34715).

⁹³ *Id.* at pp. 133-134, 253-254 (citing HISD00035155-35166, HISD00035158-35166).

⁹⁴ See Ex. I-2: DMCA Comparison, at pp. 139-141.

⁹⁵ *Id.* at pp. 151-155.

⁹⁶ See Ex. I-1: DMCA Count, at pp. 159-160 (citing HISD00045372-45379).

⁹⁸ See Ex. I-1: DMCA Count, at pp. 215-216 (citing HISD00036131-36137, HISD00036166-36167).

Registration	HISD Employee(s) and Creation/Distribution	DMCA Violations Count
<p><i>"5th Grade Science TAKS Review Guide.doc"</i>⁹⁷</p>	She sent it to another recipient on Sept. 22, 2009, calling it "5 th grade dynanotes." ⁹⁹	4
	Marilyn Thompson sent the same file to Betty Williams on Oct. 5, 2009, and Williams forwarded the file to 2 recipients that same day. ¹⁰⁰	2
	Miller sent the same file to 2 recipients on Sept. 23, 2009, and to 1 other recipient on December 11, 2012. ¹⁰¹ The subject line read "science dynanotes reviews." On Oct. 11, 2013, Miller sent the file to 1 recipient, noting that she had previously used the "5 th grade dynanotes" at Welch and would be using it at her new campus, Johnston MS. ¹⁰² She advised her recipient to delete the file if he didn't want them. ¹⁰³ Miller then distributed the file to 3 more recipients on Oct. 23, 2013, again calling the materials "dynanotes." ¹⁰⁴ Miller distributed the same file yet again on Dec. 10, 2014, this time to 1 recipient and warned "don't forget to take off bottom warning before copying a class set." ¹⁰⁵	1
		3
	Shelene Livas distributed a copy of the same file to 2 recipients on Dec. 18, 2012. ¹⁰⁶	1
		3
	Jamie Scott also distributed this file to 1 recipient on April 15, 2011, and to 4 more recipients on April 4, 2014 and April 8, 2014. ¹⁰⁷ Scott distributed the file yet again on Jan. 8, 2015, to 2 recipients, and to another 8 recipients on Jan. 13, 2015. ¹⁰⁸	15
<p>Grade 5 Math for TAKS (TX0006320462)</p> <p><i>"5th Math TAKS.doc"</i>¹⁰⁹</p>	HISD's Shirley Corte emailed unauthorized copies of DynaStudy's Grade 5 Math for TAKS, Grade 5 Science for TAKS, and Student Test-Taking Tips to at least 12 recipients on or about March 24, 2009. These illegal copies excluded DynaStudy's CMI from the left and bottom margins. ¹¹² However, the copy of Test Taking Tips included its "DynaNotes" title. Metadata associated with these email demonstrates that the files	13

⁹⁷ See Ex. I-2: DMCA Comparison, at pp. 151-155.

⁹⁹ *Id.* at pp. 217-218 (citing HISD00033340-33341).

¹⁰⁰ *Id.* at pp. 221-222 (citing HISD00033225-33226, HISD00036203-36204).

¹⁰¹ *Id.* at pp. 219-220, 231-232 (citing HISD00036131-36137, HISD00036166-36167, HISD00039528-39529).

¹⁰² *Id.* at pp. 235-236 (citing HISD00039536-39557).

¹⁰³ *Id.*

¹⁰⁴ *Id.* at pp. 237-238 (citing HISD00035145-35151).

¹⁰⁵ *Id.* at pp. 241-242 (citing HISD00041946-41951).

¹⁰⁶ *Id.* at pp. 233-234 (citing HISD00035020-35021).

¹⁰⁷ *Id.* at pp. 225-226, 239-240 (citing HISD00034522-34524, HISD00035186-35187, HISD00035191-35202).

¹⁰⁸ *Id.* at pp. 243-246 (citing HISD00044690-44691, HISD00044679-44680).

¹⁰⁹ See Ex. I-2: DMCA Comparison, at pp. 142-144.

¹¹² See Ex. I-1: DMCA Count, at pp. 161-166, 197-200, 394-403 (citing HISD00033295-33296, 33300, 33302, 33307, 33309-33310, 33312, 33314, 33316-33317, 33321, 33333, 36052-36053, 36059).

Registration	HISD Employee(s) and Creation/Distribution	DMCA Violations Count
Grade 5 Science for TAKS (TX0006317606) <i>"5th Grade Science TAKS Review Guide.doc"</i> ¹¹⁰ Student Test-Taking Tips (TX0006438161) <i>"Test Taking Tips.doc"</i> ¹¹¹	<p>were created by "HISD" on February 7, 2007 ("5th Grade Science TAKS Review Guide.doc"), February 12, 2012 ("5th Math TAKS.doc") and March 27, 2007 ("Test Taking Tips.doc").¹¹³ On this same day, Corte sent the infringing files to HISD's Debbie Rhoden and asked that Rhoden send it "to all fifth grade parents."¹¹⁴ Corte re-circulated the files in January 2011, remarking to her five recipients, "here are the study guides we spoke about in the meeting."¹¹⁵ Rhoden then distributed the file to 2 additional recipients.¹¹⁶</p> <p>Corte circulated the same infringing files to 4 recipients on September 22, 2011 (in two separate email).¹¹⁷</p> <p>Corte sent only the unauthorized file of Grade 5 Science for TAKS to 2 recipients on Dec. 16, 2011. One of her recipients, Kim Winston, sent the file on to one other.¹¹⁸</p>	<p>5</p> <p>2</p> <p>4</p> <p>3 (Science only)</p>
Grade 8 Science for STAAR (TX0007390900) <i>"Dyna Notes 8th Science STAAR.pdf"</i> ¹¹⁹	<p>On February 26, 2013, HISD's Sarinder Singh distributed an unauthorized copy of DynaStudy's Grade 8 Science for STAAR. Despite the removal of CMI from the bottom margin, DynaStudy's copyright notice is clearly visible in the left margin. The subject line of his email and the file name reference the material as belonging to "Dyna Notes."¹²⁰ Singh circulated additional copies of this infringing file that same day to at least 11 more recipients.¹²¹</p> <p>Singh then re-circulated additional unauthorized copies of the file on February 27, 2013;¹²² March 1, 2013;¹²³ March 5, 2013;¹²⁴ March 6, 2013;¹²⁵ March 28, 2013;¹²⁶ April 2, 2013;¹²⁷ April 3,</p>	<p>2</p> <p>11</p> <p>28</p>

¹¹⁰ *Id.* at pp. 151-155.

¹¹¹ *Id.* at pp. 241-243.

¹¹³ See Ex. I-4: Metadata chart.

¹¹⁴ See Ex. I-1: DMCA Count, at pp. 167-168, 201-202 (citing HISD00036052-36053, 36057).

¹¹⁵ *Id.* at pp. 169-170, 223-224, 406-407 (citing HISD 00034017-34018, 34022, 34024, 34026).

¹¹⁶ *Id.* at pp. 167-168 (citing HISD00036052-36057).

¹¹⁷ *Id.* at pp. 171-172, 227-228, 408-409 (citing HISD 00034567-34568, 34572, 34574, 34576).

¹¹⁸ *Id.* at pp. 229-230 (citing HISD00041248-4124).

¹¹⁹ See Ex. I-2: DMCA Comparison, at pp. 178-184.

¹²⁰ See Ex. I-1: DMCA Count, at pp. 271-272 (citing HISD00015527-15528).

¹²¹ *Id.* at pp. 275-276 (citing HISD00015541-15542).

¹²² *Id.* at pp. 277-280 (citing HISD00006753, 6754, HISD 00015548-15549).

¹²³ *Id.* at pp. 281-282 (citing HISD00015555-15556).

¹²⁴ *Id.* at pp. 283-288 (citing HISD15587-15588, 15594-15595, 15601-15602).

¹²⁵ *Id.* at pp. 289-290 (citing HISD00015608-15609).

¹²⁶ *Id.* at pp. 291-292 (citing HISD00015616-15617).

¹²⁷ *Id.* at pp. 293-294 (citing HISD00015623-15624).

Registration	HISD Employee(s) and Creation/Distribution	DMCA Violations Count
	<p>2013;¹²⁸ April 4, 2013;¹²⁹ April 15, 2013;¹³⁰ April 22, 2013;¹³¹ and April 23, 2013.¹³²</p> <p>Singh's ongoing distribution of the file continued on July 15, 2013;¹³³ October 8, 2013;¹³⁴ December 17, 2013;¹³⁵ January 21, 2014;¹³⁶ January 27, 2014;¹³⁷ January 29, 2014;¹³⁸ February 19, 2014;¹³⁹ March 26, 2014;¹⁴⁰ April 7, 2014;¹⁴¹ and February 18, 2015.¹⁴² Recipient Monique Dorsett forwarded Singh's file to 1 recipient on Feb. 18, 2015.¹⁴³</p> <p>HISD's Secondary Science Teacher Development Specialist Shirlean McEwen distributed the same file to at least 10 recipients on April 8, 2014, again referring to the materials as "Dyna Notes."¹⁴⁴ The copyright notice is clearly visible on these copies as well.</p>	<p>16</p> <p>2</p> <p>11</p>
<p>Grade 8 Science for STAAR (TX0007390900)</p> <p><i>"PT – Matter and Energy (Chem).docx"</i>¹⁴⁵</p> <p><i>"PT – Force and Motion.docx"</i>¹⁴⁶</p>	<p>HISD's Courtney Cross-Johnson copied pages from DynaStudy's Grade 8 Science for STAAR into five separate and unauthorized files, all with all CMI removed. Cross-Johnson distributed those files to one recipient on April 7, 2012.¹⁵⁰</p> <p>Cross-Johnson later distributed two of the copied files to another recipient on March 30, 2015.¹⁵¹</p>	<p>2</p> <p>1</p>

¹²⁸ *Id.* at pp. 295-296 (citing HISD00015630-15631).

¹²⁹ *Id.* at pp. 297-300 (citing HISD00015637-15638, 15644-15645).

¹³⁰ *Id.* at pp. 301-304 (citing HISD00015675-15676, 15693-15694).

¹³¹ *Id.* at pp. 305-308 (citing HISD00015706-15707, 15713, 15724).

¹³² *Id.* at pp. 309-312 (citing HISD00015730-15731, 15737-15738).

¹³³ *Id.* at pp. 313-314 (citing HISD00015667-15668).

¹³⁴ *Id.* at pp. 315-316 (citing HISD00015774-15775).

¹³⁵ *Id.* at pp. 317-318 (citing HISD00015878-15879).

¹³⁶ *Id.* at pp. 319-320 (citing HISD00015835-15866).

¹³⁷ *Id.* at pp. 321-322 (citing HISD00008000-8001).

¹³⁸ *Id.* at pp. 323-324 (citing HISD0008007-8008).

¹³⁹ *Id.* at pp. 325-326 (citing HISD00015885-15886).

¹⁴⁰ *Id.* at pp. 327-328 (citing HISD0008443-8444).

¹⁴¹ *Id.* at pp. 329-330 (citing HISD00010688-10689).

¹⁴² *Id.* at pp. 333-334 (citing HISD00002490-2491).

¹⁴³ *Id.* at pp. 335-336 (citing HISD00002497-2498).

¹⁴⁴ *Id.* at pp. 331-332 (citing HISD00002186-2187).

¹⁴⁵ See Ex. I-2: DMCA Comparison, at pp. 165-177.

¹⁴⁶ *Id.*

¹⁵⁰ See Ex. I-1: DMCA Count, at pp. 267-268 (citing HISD00034778-34851, HISD00034954-34955, HISD00041894-41908).

¹⁵¹ See Ex. I-1: DMCA Count, at pp. 269-270 (citing HISD00039623-39641).

Registration	HISD Employee(s) and Creation/Distribution	DMCA Violations Count
<p><i>"PT – Earth and Space.docx"</i>¹⁴⁷</p> <p><i>"PT – Organisms and Environment.docx"</i>¹⁴⁸</p> <p><i>"PT – Lab Skills.docx"</i>¹⁴⁹</p>		
<p>Grade 8 Science for STAAR (TX0007390900)</p> <p><i>"Dyna_Notes_8th Science STAAR0001.pdf"</i>¹⁵²</p>	<p>HISD's Irene Fong distributed a separate copy of Grade 8 Science for STAAR on May 2, 2013 stating "I've also attached a copy of dynanotes...."¹⁵³ This copy included the same whited out CMI from the bottom margin but visible copyright notice in the left margin as the copy distributed by Singh.¹⁵⁴</p> <p>Fong's recipient Nana Baffour forwarded the file on to 1 other recipient the same day, then again on May 13, 2015.¹⁵⁵</p> <p>On April 27, 2017, Stacy Mayzone sent the same file to 1 recipient and requested extra paper to "make a review packet" to include the same file.¹⁵⁶</p>	<p>2</p> <p>1</p> <p>1</p> <p>1</p>
<p>Grade 8 Science for STAAR (TX0007390900)</p> <p><i>"Dyna_Notes 8th Science STAAR (2).pdf"</i>¹⁵⁷</p>	<p>Monique Dorsett distributed a separate file to 1 recipient on March 11, 2015, also with the bottom margin whited out but the copyright notice and title remaining clearly visible.¹⁵⁸</p>	<p>1</p>
<p>Grade 8 Science for STAAR (TX0007390900)</p> <p><i>"Dyna_Notes 8th Science STAAR0001[1].pdf"</i>¹⁵⁹</p>	<p>HISD's Sheryl Parker distributed a copy of Singh's unauthorized copy on April 4, 2013, with the same alteration of the CMI in the bottom margin but visible copyright notice in the left margin; The file name expressly referenced "Dyna_Notes."¹⁶⁰</p>	<p>2</p>
<p>Grade 8 Science for TAKS (TX0006413398)</p>	<p>HISD's Stephanie Miller distributed an unauthorized copy of DynaStudy's Grade 8 Science for TAKS, with all CMI removed from the left and bottom margins, on April 20, 2009¹⁶² and again</p>	<p>13</p>

¹⁴⁷ *Id.*¹⁴⁸ *Id.*¹⁴⁹ *Id.*¹⁵² See Ex. I-2: DMCA Comparison, at pp. 192-198.¹⁵³ See Ex. I-1: DMCA Count, at pp. 339-340 (citing HISD00006858-6859).¹⁵⁴ *Id.*¹⁵⁵ *Id.* at pp. 341-344 (citing HISD00007002-7003, HISD00002512-2513).¹⁵⁶ *Id.* at pp. 345-346 (citing HISD00028384-28385).¹⁵⁷ See Ex. I-2: DMCA Comparison, at pp. 199-205.¹⁵⁸ See Ex. I-1: DMCA Count, at pp. 347-348 (citing HISD00002405-2406).¹⁵⁹ See Ex. I-2: DMCA Comparison, at pp. 185-191.¹⁶⁰ See Ex. I-1: DMCA Count, at pp. 337-338 (citing HISD00006783-6784).¹⁶² See Ex. I-1: DMCA Count, at pp. 353-354 (citing HISD33153-33154).

Registration	HISD Employee(s) and Creation/Distribution	DMCA Violations Count
"8 th Grade Science TAKS .doc" ¹⁶¹	on Aug. 21, 2009; ¹⁶³ Sept. 23, 2009; ¹⁶⁴ April 6, 2011; ¹⁶⁵ Oct. 19, 2013; ¹⁶⁶ and Dec. 10, 2014. ¹⁶⁷ Metadata associated shows the file was created on February 7, 2007. ¹⁶⁸ Miller was aware that she was distributing DynaStudy materials as she repeatedly referenced them by their brand name of "Dyna notes." ¹⁶⁹ In her distribution dated Dec. 10, 2014, Miller expressly warned a colleague "don't forget to take off bottom warning before copying a class set." ¹⁷⁰ Miller's recipient, Thomas Ramey, distributed the same file (referenced as "dynanotes") to one more recipient.	3
	HISD administrator Nedaro Bellamy distributed a copy of Grade 8 Science to TAKS to 2 recipients on Jan. 22, 2009, with all CMI removed and referring to the document as "Dyna-Notes." ¹⁷¹ Bellamy circulated the same file to 2 others on March 12, 2009. ¹⁷²	2
	Chris Sanchez also distributed a copy of this file to 1 recipient in an email entitled "Dinah notes" on March 9, 2010. ¹⁷³	2
	HISD's Caren Grant, Instructional Coordinator for Pershing MS, also distributed the same file (missing all CMI in the left and bottom margins) to various HISD personnel, including Joaquin Ortiz and Devalyn Green. ¹⁷⁴ Joaquin Ortiz and Devalyn Green further distributed the infringing file on April 9, 2010; ¹⁷⁵ April 23, 2010; ¹⁷⁶ and April 26, 2010. ¹⁷⁷	8
	Jamie Scott also distributed this infringing file on April 4 and 8, 2014, ¹⁷⁸ Jan. 8, 2015, ¹⁷⁹ and Jan. 13, 2015. ¹⁸⁰	10
		15

¹⁶¹ See Ex. I-2: DMCA Comparison, at pp. 213-219.

¹⁶³ *Id.* at pp. 355-356 (citing HISD00036159-36160).

¹⁶⁴ *Id.* at pp. 357-358 (citing HISD00036136-36137).

¹⁶⁵ *Id.* at pp. 373-375 (citing HISD00034243-34244 36658-36659).

¹⁶⁶ *Id.* at pp. 376-377 (citing HISD00039561-39562).

¹⁶⁷ *Id.* at pp. 380-381 (citing HISD00041946-41951).

¹⁶⁸ See Ex. I-4: Metadata chart.

¹⁶⁹ See Ex. I-1: DMCA Count, at pp. 353-358, 373-377, 380-381 (and all Bates labeled documents cited therein).

¹⁷⁰ *Id.* at pp. 380-381 (citing HISD00041946-41947).

¹⁷¹ *Id.* at pp. 349-350 (citing HISD00011015-11016).

¹⁷² *Id.* at pp. 351-352 (citing HISD00016114-16115).

¹⁷³ *Id.* at pp. 359-360 (citing HISD00036218-36219).

¹⁷⁴ *Id.* at pp. 361-362 (citing HISD00033950-33951).

¹⁷⁵ *Id.* at pp. 363-364 (citing HISD00036369-36370).

¹⁷⁶ *Id.* at pp. 365-366 (citing HISD00039707-39708).

¹⁷⁷ *Id.* at pp. 367-372 (citing HISD00033844-33845, 33957-33958, 39677-39678).

¹⁷⁸ *Id.* at pp. 378-379 (citing HISD00035197-35198).

¹⁷⁹ *Id.* at pp. 382-383 (citing HISD00044690-44695).

¹⁸⁰ *Id.* at pp. 384-385 (citing HISD00044679-44684).

Registration	HISD Employee(s) and Creation/Distribution	DMCA Violations Count
Grade 8 Science for TAKS (TX0006413398) <i>"DynaNotes – 8th Grade Science TAKS.pdf"</i> ¹⁸¹	LaTonya Bryant distributed this file, with all CMI removed, to one recipient on Oct. 22, 2013, and requested color copies. ¹⁸²	2
Grade 8 Science for TAKS (TX0006413398) <i>"dynanotes – 8th grade science taks.pdf"</i> ¹⁸³	Jesse Nemec sent a separate version of this file to 1 recipient on March 3, 2014, with all CMI removed. ¹⁸⁴	2
Student Test-Taking Tips (TX0006438161) <i>"Test Taking Tips.doc"</i> ¹⁸⁵	On March 11-12, 2009, HISD's Torrye Hoper requested and West Region Office Science Education Program Manager Nedaro Bellamy provided an unauthorized copy of DynaStudy's Student Test Taking Tips with all CMI removed. Hooper referred to the materials as "Dana Notes" and Bellamy's response referred to "Dyna Notes." ¹⁸⁶ Metadata from these emails shows the infringing file was created by HISD on March 27, 2007. ¹⁸⁷ The "Dyna Notes" title is visible in the unauthorized copy.	3
	Robert Dodds distributed the same infringing file (with "DynaNotes" clearly visible on the copy) on March 12, 2010. ¹⁸⁸	2

Thus, HISD committed the following number of violations as to each of these Copyrighted Works:

(93) Grade 4 Math for TAKS, (80) Grade 4 Reading for TAKS, (41) Grade 5 Math for TAKS, (19) Grade 5 Reading for TAKS, (133) Grade 5 Science for TAKS, (14) Grade 6 Math for TAKS, (14) Grade 7 Math for TAKS, (57) Grade 8 Science for TAKS, (81) Grade 8 Science for STAAR, and (29) Test-Taking Tips.¹⁸⁹

HISD also intentionally removed or altered DynaStudy's CMI and/or distributed those

¹⁸¹ See Ex. I-2: DMCA Comparison, at pp. 220-226.

¹⁸² See Ex. I-1: DMCA Count, at pp. 386-387 (citing HISD00007961-7962).

¹⁸³ See Ex. I-2: DMCA Comparison, at pp. 227-233.

¹⁸⁴ See Ex. I-1: DMCA Count, at pp. 388-389(citing HISD00039578-39579, HISD00039585).

¹⁸⁵ See Ex. I-2: DMCA Comparison, at pp. 241-243.

¹⁸⁶ See Ex. I-1: DMCA Count, at pp. 392-393 (citing HISSD00016114, 16121).

¹⁸⁷ See Ex. I-4: Metadata chart.

¹⁸⁸ Ex. I-1: DMCA Count, at pp. 404-405 (citing HISSD00042477-42478, HISSD00042593, HISSD00042703).

¹⁸⁹ *Id.* at pp. 107-389.

copies of DynaStudy's Exit Level Science (TX0006452132) (14 violations),¹⁹⁰ Grade 3 Math for TAKS (TX0006320465) (3 violations),¹⁹¹ Grade 5 Reading for TAKS (TX0006320463) (19 violations),¹⁹² Grade 8 Math for TAKS (TX0006320464) (3 violations),¹⁹³ and Grade 8 Social Studies for TAKS (TX0006410788) (2 violations)¹⁹⁴ with knowledge that they were distributing materials copyrighted by DynaStudy and marketed as "Dyna Notes." Similarly, large portions of DynaStudy's Algebra I EOC were saved to two of HISD's servers, both with CMI removed, (2 violations).¹⁹⁵ All of these acts constitute violations of the DMCA for which DynaStudy seeks the recovery of statutory damages and other remedies.

2. *HISD knew or had reasonable grounds to know that such actions would induce, enable, facilitate, or conceal the infringement of DynaStudy's rights under the DMCA*

a. *HISD and its employees had heightened knowledge of the DMCA*

HISD's district-wide policies on the use of intellectual property refer all employees to the entire text of the Copyright Act of 1976 and the DMCA.¹⁹⁶ More specifically, HISD's policies explain the copyright symbol,¹⁹⁷ define what constitutes infringement,¹⁹⁸ and expressly prohibit:

- Copying of print materials that are copyrighted;¹⁹⁹
- Copying intended to substitute for books, publishers' reprints or periodicals;²⁰⁰
- Copying without inclusion of copyright notice appearing on copyrighted works—

¹⁹⁰ *Id.* at pp. 90-102; *see also* Ex. I-2: DMCA Comparison, at pp. 89-123.

¹⁹¹ *Id.* at pp. 103-106; *see also* Ex. I-4 (establishing that this file was created by "HISD" on February 12, 2007); *see also* Ex. I-2: DMCA Comparison, at pp. 124-126.

¹⁹² *Id.* at pp. 181-190; *see also* Ex. I-2: DMCA Comparison, at pp. 145-150.

¹⁹³ *Id.* at pp. 263-266; *see also* Ex. I-2: DMCA Comparison, at pp. 162-164.

¹⁹⁴ *Id.* at pp. 390-391; *see also* Ex. I-2: DMCA Comparison, at pp. 234-240.

¹⁹⁵ *Id.* at pp. 410-412 (citing HISD00000955-959; HISD00000924-938, 953-954; HISD00001127-1132, 1147-1148; *see also* Ex. I-2 DMCA Comparison, at pp. 1-12.

¹⁹⁶ *See* Ex. P: HISD Policies, at HISD00028637-28638.

¹⁹⁷ *Id.* at HISD00028637-28638, 00028647.

¹⁹⁸ *Id.* at HISD00028641.

¹⁹⁹ *Id.* at HISD00028640; *see also* Ex. O: 30(b)(6) depo. of HISD 30(b)(6), pp. 24:11-21; 25:25-26:11; 29:17-24; 30:22-31:14; 32:14-33:12; 34:17-35:24; 36:21-37:3; 43:23-46:20; 49:2-9.

²⁰⁰ *Id.* at HISD00028640; *see also* Ex. O: 30(b)(6) depo. of HISD 30(b)(6), p. 49:2-9.

particularly if copying an entire page.²⁰¹

- Use of copyrighted material in electronic media, which is defined by HISD to include “all forms of digital media such as text messaging, instant messaging, electronic mail (e-mail) and Internet and Social Media;”²⁰²

These same policies provide a direct link to the DMCA and purportedly require each employee to adhere to the DMCA.²⁰³ HISD admitted that each employee of the district receives and is deemed to have actual knowledge of these policies.²⁰⁴ Thus, HISD as well as its employees have heightened knowledge of the DMCA and its requirements and are, therefore, charged with actual knowledge that the intentional removal of CMI from DynaStudy’s copyrighted materials and/or distribution of unauthorized copies of DynaStudy’s materials with the CMI removed or altered would “induce, enable, facilitate, or conceal” the infringement of DynaStudy’s rights under the DMCA.

b. HISD previously purchased materials from DynaStudy and received formal notice of all protections afforded those materials

From 2005 through 2016, and even into the present, HISD purchased thousands of sets of DynaStudy’s Copyrighted Works.²⁰⁵ Every DynaStudy material at issue that was purchased by HISD included DynaStudy’s trademark “DynaNotes” in the title, a specific copyright notice in the left margin, and an express prohibition against copying in the bottom margin.²⁰⁶ HISD’s own documents evidence that HISD employees had access to DynaStudy’s Copyrighted Works through these purchases²⁰⁷ and that HISD’s employees were aware of the copyright notice and prohibition

²⁰¹ *Id.* at HISD00028640; *see also* Ex. O: 30(b)(6) depo. of HISD 30(b)(6), pp. 49:25-50:11; 52:1-6.

²⁰² *See* Ex. O: 30(b)(6) depo. of HISD 30(b)(6), pp. 36:21-37:3; *see also* Ex. P: HISD Policies, at HISD00030995.

²⁰³ *See* Ex. P: HISD Policies, at HISD00028643; *see also* Ex. O: 30(b)(6) depo. of HISD 30(b)(6), pp. 58:19-59:10.

²⁰⁴ *See* Ex. O: 30(b)(6) depo. of HISD 30(b)(6), pp. 24:11-21; 25:25-26:11; 29:17-24; 30:22-31:14; 32:14-33:12; 34:17-35:24.

²⁰⁵ *See* Ex. I-3: DynaStudy Invoices to HISD.

²⁰⁶ *See* Ex. Q: E. Harris depo., pp. 113:1-17; 118:10-119:21.

²⁰⁷ *See* Ex. J: Partridge depo., pp. 14:8-15:10; 19:10-16; 19:25-20:11; 20:20-21:19; 30:15-31:18, and depo. exhibits 2-14.

against copying through HISD's own policies and DynaStudy's prohibitions on copying.²⁰⁸ In fact, DynaStudy repeatedly placed HISD on notice of the infringement of its Copyrighted Works.²⁰⁹ In light of HISD's purchase history, HISD is charged with actual knowledge that the intentional removal of CMI from DynaStudy's copyrighted materials and/or distribution of unauthorized copies of DynaStudy's materials with the CMI removed or altered would "induce, enable, facilitate, or conceal" the infringement of DynaStudy's rights under the DMCA.

c. HISD's employees were familiar with and repeatedly referred to DynaStudy's trademarked brand name, DynaNotes, in connection with their DMCA violations

DynaStudy's Copyrighted Works are easily recognizable, even with the CMI removed, as evidenced by the HISD employees' repeated reference to their own unauthorized copies as "dyna notes" or some similar derivative—either in the actual file name or the corresponding email.²¹⁰ And many of the copies removed a portion of DynaStudy's CMI from the Copyrighted Works, *but left other portions remaining*, such as removing the copyright notice in the left margin, but *leaving* "Dyna Notes" in the title, or removing the CMI in the bottom margin, but *leaving* the entire copyright notice in the left-hand margin.²¹¹ This evidence proves knowledge by HISD's employees of DynaStudy's products and proves the distribution was improper under the DMCA. 17 U.S.C. §1202.

B. HISD is not entitled to the DMCA's safe harbor protections as a matter of law

Even assuming that a public school district qualifies as an ISP (a position not adopted by

²⁰⁸ *Id.* at pp. 85:4-12; *see also* Ex. I-1: DMCA Count, at pp. 64-73 (citing HISD0018440-18444), and pp. 380-381 (citing HISD00041946-41947).

²⁰⁹ *See* Exs. C – H.

²¹⁰ *See* Ex. I-1: DMCA Count, at pp. 1-22, 28-102, 107-124, 127-130, 135-156, 161-172, 175-178, 183-194, 197-220, 223-224, 227-232, 235-238, 241-242, 249-252, 257-260, 267-360, 373-377, 380-381, 386-410 (and all HISD Bates labels identified therein).

²¹¹ *See* Ex. I-1: DMCA Count, at pp. 271-348, 394-395.

DynaStudy),²¹² no evidence exists to establish that HISD is entitled to safe harbor protections under the DMCA.

A party asserting an affirmative defense of the DMCA's safe harbor bears the burden of establishing entitlement to its protections. *See, e.g., ALS Scan, Inc. v. RemarQ Comms., Inc.*, 239 F.3d 619, 625 (4th Cir. 2001); *Blue Cross Blue Shield of Ala. v. Weitz*, 913 F.2d 1544, 1552 (11th Cir. 1990). To be eligible for safe harbor protection, Section 512(i) provides that a service provider must maintain a policy to terminate "repeat offenders." 17 U.S.C. § 512(i)(1)(A). Additionally, HISD must: (1) designate an agent to the U.S. Copyright Office and to the public through its service; (2) act expeditiously to "remove or disable access to" infringing material it actually knows of or of which it should be aware from "facts or circumstances" showing that "infringing activity is apparent;" (3) have no actual or red flag knowledge of the infringing activity; and (4) receive no financial benefit from the infringing activity. *See, e.g., Disney Enters. v. Hotfile Corp.*, 2013 U.S. Dist. LEXIS 172339 (S.D. Fla. Aug. 28, 2013). Because no evidence exists to demonstrate that HISD has satisfied all of these pre-requisites, and because competent summary judgment evidence establishes that HISD cannot satisfy these requirements, HISD is not entitled to safe harbor protection as a matter of law.

1. *HISD failed to register a DMCA agent with the U.S. Copyright Office*

To demonstrate safe harbor eligibility, a service provider must make "available through its service, including on its own website in a location accessible to the public, and by providing to the Copyright Office, substantially the following information[:] the name, address, phone number, and electronic mail address of the agent." 17 U.S.C. § 512(c)(2); 37 C.F.R. § 201.38. One cannot

²¹² Indeed, HISD's has control over its own employees and agents who committed direct copyright infringement while in the course and scope of their employment. This factor, alone, should disqualify any classification of HISD as an "Internet Service Provider."

retroactively qualify for safe harbor for infringements occurring before proper designation of an agent under the statute. 17 U.S.C. §512(c)(2). Additionally, the statute provides that “The Register of Copyrights shall maintain a current directory of agents available to the public for inspection, including through the Internet” *Id.*; *see also* Nimmer on Copyright § 12B.04(3) (updated 2015). Thus, under § 512(c), a service provider must designate an agent on two parallel sources: the provider’s website and the USCO directory.

It is undisputed that HISD has not registered a DMCA agent *in its own name* with the U.S. Copyright Office or posted its own DMCA agent on the website at www.houstonisd.org. Instead, a separate entity known as Schoolwires—the *actual* ISP for HISD’s website—has filed a DMCA agent designation with the U.S. Copyright Office and identifies its designated copyright agent in the portion of HISD’s website dedicated to *Schoolwires’s* terms and conditions.²¹³ Yet, the statute specifically “requires that each service provider” must provide this information for itself.

In *BWP Media USA Inc. v. Hollywood Fan Sites LLC*, a service provider alleged it was “covered” by the designation of a DMCA agent by its parent company and, therefore, entitled to safe harbor protection. 115 F. Supp. 3d 397, 402 (S.D.N.Y. 2015) The court disagreed, noting that “the statute does not contemplate that a service provider entity can be shielded by the safe harbor where that entity has no presence at all in the USCO directory.” *Id.* Furthermore, “[i]t is implausible that parties attempting to find a provider’s DMCA agent designation, using the USCO’s database, are expected to have independent knowledge of the corporate structure of a particular service provider.” *Id.* On this basis, the court denied safe harbor. Here, there is no corporate affiliation between HISD and Schoolwires; Schoolwires was hired by HISD to be the actual internet service provider for HISD’s website. And HISD’s designated agent for the DMCA,

²¹³ *See* Ex. K: HISD’s Response to Request for Production No. 1; *see also* Ex. L Screenshot of Schoolwires’s designation of DMCA agent; Ex. M: U.S. Copyright filing of notice of DMCA agent on behalf of Schoolwires.

Chief of Staff Cynthia Wilson, is not identified anywhere on HISD's website as the DMCA agent, nor is she registered as HISD's DMCA agent with the U.S. Copyright Office.²¹⁴ Thus, it is clear that HISD has not and is not entitled to safe harbor protection as a matter of law.

2. *HISD received a financial benefit attributable to the infringing activity and had the right and ability to control such activity*

Also under § 512(c), an ISP loses safe harbor protection if: (1) the provider receives a financial benefit directly attributable to the infringing activity” and (2) the ISP “has the right and ability to control such activity.” 17 U.S.C. § 512(c)(1)(B). HISD received a financial benefit from its copying, has the right to control its employees' behavior, and is ineligible for safe harbor as a matter of law. First, as a direct result of the infringing activity at issue, HISD saved money by ripping off DynaStudy's materials instead of buying DynaStudy's materials legally.²¹⁵ Second, there can be no dispute that HISD's employees are its agents and that HISD has the right and ability to hire, fire, reprimand and police its own employees.²¹⁶ For these reasons, HISD is not entitled to any safe harbor protections under the DMCA as a matter of law. *See* 17 U.S.C. §512(c)(1)(B).

3. *HISD has failed to maintain and reasonably implement any policy to terminate repeat offenders*

The repeat offender requirement of § 512(i) calls for a policy “reasonably implemented” that provides for the termination of repeat offenders. 17 U.S.C. §512(i). “Implementation is reasonable if under ‘appropriate circumstances,’ the service provider terminates users who repeatedly or blatantly infringe copyright.” *Disney Enters.*, 2013 U.S. Dist. LEXIS 172339 at *63-

²¹⁴ *See* Ex. K: HISD's Response to Request for Production No. 1; *see also* Ex. L Screenshot of Schoolwires's designation of DMCA agent; Ex. M: U.S. Copyright filing of notice of DMCA agent on behalf of Schoolwires; *but see* Exhibit O: HISD's 30(b)(6) Deposition of Annie Wolfe at pp. 37:10-38:5 (identifying HISD's designated agent for the DMCA as Chief of Staff Cynthia Wilson and, prior to her, Jason Spencer).

²¹⁵ *See supra.*, pp. 21-23; *see also* Ex. I-3: DynaStudy invoices to HISD.

²¹⁶ *See* Ex. O: 30(b)(6) of HISD, pp. 34:3-16; 104:10-23.

64. Thus, to be “reasonably implemented,” a policy “must be capable of tracking infringers....” *Id.* at *67-68. Here, HISD has no policy in place to track repeat offenders, has taken no actions to terminate or even discipline employees who are repeat infringers, and has failed to enforce any policy designed to discourage HISD employees from interfering with technology protection measures, such as copy prevention measures.²¹⁷

4. HISD had actual or “red flag” knowledge of the infringing activity

Safe harbor under § 512(c) is available only if the ISP “does not have actual knowledge that the material or an activity using the material on the system or network is infringing” or “is not aware of facts or circumstances from which infringing activity is apparent” (known as “red flag” knowledge). 17 U.S.C. § 512(c)(1)(A)(i), (ii); *Colombia Pictures Indus. v. Gary Fung*, 710 F.3d 1020 (9th Cir. 2013), *citing Viacom Int’l, Inc. v. YouTube, Inc.*, 676 F.3d 19, 31 (2d Cir. 2012). As demonstrated above, HISD had actual knowledge of the infringing activities through explicit copyright notices and warnings on materials HISD legally purchased from DynaStudy prior to the infringing acts, through the direct knowledge of its employees and their repeated reference to the materials as “dyna notes,” and through repeated notices from DynaStudy regarding ongoing infringement.

VI. CONCLUSION

For all of these reasons, DynaStudy requests that this Court dismiss HISD’s affirmative defense of DMCA safe harbor and enter summary judgment in DynaStudy’s favor on its claim against HISD for violation of the DMCA and award the minimum statutory damages of \$2,500 for each of HISD’s 2,100 DMCA violations, for a total award of \$5,250,000 in statutory damages pursuant to 17 U.S.C. § 1202(c)(3)(B).

²¹⁷ See Ex. O: 30(b)(6) deposition of HISD’s Annie Wolfe, pp. 17:14-18:4; 35:11-24; 36:7-13; 36:17-20; 58:12-18; 59:11-19; 60:21-61:23.

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Respectfully submitted,

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CERTIFICATE OF SERVICE

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